No. 09-1575

Supreme Court, U.S.
FILED
SEP 7 - 2010
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IN THE

Supreme Court of the United States

RIVERVIEW HEALTH INSTITUTE LLC; MIDDLETOWN SURGICAL ASSOCIATES INC., d/b/a Surgical Weight Loss Center; OAK LEAF HEALTH GROUP LLC, d/b/a St. Elizabeth's Laboratories,

Petitioners,

v.

MEDICAL MUTUAL OF OHIO; KENT W. CLAPP; DAVID G. QUIRING; KATHY SCHNEEBERGER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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LEGAL ARGUMENT

A. INTRODUCTORY NOTE

In their Opposition, Respondents take certain factual liberties. They also attempt to trivialize the two legal questions presented for review by Petitioners, characterizing them as insignificant matters of "misapplication," amounting, at best, to inconsequential "quibbling" over mere judicial error. They claim that Petitioners have failed to provide the Court with an adequate showing of significant conflict, as required by Supreme Court Rule 10. In accordance with Supreme Court Rule 15.6, Petitioners hereby reply to such misstatements of fact and law.

B. PERCEIVED MISSTATEMENTS OF FACT

In their Opposition, Respondents present their "Factual Background" of the case. Opposition at 3- 8. Petitioners wish to address two perceived misstatements of fact set forth therein, as follows:

1. PETITIONERS' DIRECT CLAIMS AGAINST RESPONDENTS

Respondents represent that "[t]his case does not arise . . . from any direct relationship between Medical Mutual and Riverview." Opposition at 3. Such statement is false. In the opening sentence of the Verified Complaint initiating this case, Petitioners allege that "[t]his is a case brought by Plaintiff health-care providers of hospital, physician and laboratory services, both *directly* and as assignees of patient-insureds,

against the Defendant health insurance company and several of its individual officers and employees. . . ." Petition for a Writ of Certiorari (hereinafter "Petition"), App. D. Verified Complaint at Introduction (emphasis added). The record before the Court includes numerous other allegations of direct claims asserted by Petitioners against Respondents. See, e.g., Petition at 5-6.

2. UNSUPPORTED ALLEGATION OF "PREEMPTIVE LAWSUIT"

Respondents represent that ". . . in an effort to avoid Medical Mutual's claims for damages arising from Riverview's fraudulent claim submissions, Riverview launched a preemptive lawsuit purporting to assert three different federal RICO [Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68] claims." Such representation is nothing more than fanciful flourish. The record in this case contains no factual support for such allegation. See Petition, App. D Verified Complaint at ¶¶ 30-37.[1]

1 It might also be noted that Respondents unfairly characterize Petitioners as providers of "surgical weight loss procedures to patients at a facility in Dayton, Ohio." Opposition at 3. In fact, Petitioners provide the residents of Dayton and environs with a broad range of medical services relating to orthopedics, plastic surgery, gynecology, interventional radiology, and other surgical procedures. *See* Petition, App. D. Verified Complaint at ¶ 11; *see also Riverview Health Institute, LLC, et al. v. Medical Mutual of Ohio, et al.*, 601 F.3d 505 (6th Cir. 2010), Petition at 2A.

C. THE PENDING QUESTIONS PRESENT TRUE CONFLICTS ON SIGNIFICANT MATTERS OF NATIONAL INTEREST

It is beyond peradventure that the legal rights of Petitioners were trampled upon in this case. Respondents understandably attempt to avoid this point and, instead, focus on their claim that the questions presented by Petitioners do not provide the Court with true conflicts on matters of significant interest, as required by Supreme Court Rule 10. In particular, relevant to the "business of insurance" question, they argue that Petitioners are preoccupied with persnickety "parsing" and fail to identify any questions appropriate for review. Opposition at 1, 10-13. On the "impairment" question, Respondents argue that the conflicts referenced by Petitioners are illusory, as any differences in outcome from circuit to circuit merely reflect the impact of substantive differences in relevant state law. Opposition at 2, 13-19.

Petitioners reply to these two legal points as follows:

1. "BUSINESS OF INSURANCE" QUESTION

In their Verified Complaint, Petitioners asserted *direct* claims against Respondents, as well as other claims based upon unlawful *administrative action* on the part of Respondents. Petitioners' claims complied with all Federal pleading standards, as set forth in *Bell Atlantic v. Twombley*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). The District Court dismissed those claims without legal justification and the Sixth Circuit thereafter affirmed the decision of the District Court.

The McCarran-Ferguson Act (15 U.S.C. § 1012(b)) ("MFA") limits "reverse preemption" to conduct that falls within the ambit of the "business of insurance." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982); see also Petition at 4 (citing additional cases). Such "business of insurance" does not include direct claims made by health-care providers against insurers or claims by health-care providers that rely upon unlawful administrative actions on the part of insurers. *Id.*; *see also Genord v. Blue Cross & Blue Shield of Michigan*, 440 F.3d 802 (6th Cir. 2006).

Respondents suggest that this Court should take total comfort in the fact that the Sixth Circuit at least facially purports to recognize in its Opinion that the "business of insurance" standard articulated by this Court in *Pireno* is controlling. Such nominal recognition of *Pireno*, by itself, Respondents claim, reduces the rank injustice here to a simple "misapplication" of law, altogether unworthy of correction by this Court. See Opposition at 10-11. [2]

Respondents then go on to fashion a new and truly disingenuous argument that Petitioners should, in effect, be punished for mingling in their Verified

2 In a half-hearted way, Respondents even attempt to justify or ameliorate the injustice of the result that obtained here. In this regard, they note that Petitioners' discussion of the "business of insurance" question before the District Court was limited to a footnote. Opposition at 6. However, they fail to point out that page limitations imposed at the District Court level prevented a broader textual treatment of the issue at that time.

Complaint both direct claims and claims limited to the Respondent insurance company's mere administration of claims (those outside the "business of insurance") with the claims of insureds that were assigned to them (those within the "business of insurance"). Opposition at 11-13. Respondents argue that courts ought not to be required to "parse" or distinguish between such valid and invalid claims. *Id.* Simply put, Respondents suggest that, in such circumstances, U.S. courts should simply throw out the proverbial baby with the bath water. The argument is barbaric.

The conduct at the heart of Petitioners' RICO claims implicates some matters that come within MFA's reverse-preemption rule and others that do not.[3] By and large, courts exist to "parse" facts and law. Petitioners' Verified Complaint passed muster under all pleading requirements imposed by law. Petitioners staked their right to recover under RICO on all of the allegations set forth in their Verified Complaint. A review of the Verified Complaint, in fact, reveals a plethora of references to RICO-related claims outside the "business of insurance." *See* Petition, App. D. Verified Complaint, at ¶¶ 60a-104a.

The Sixth Circuit panel did not properly follow and apply this Court's precedents concerning the "business

[3] Respondents try, but fail, to elevate the Sixth Circuit's passing reference to "conduct at the heart of Plaintiff's complaint," contained in its treatment of the "impairment" issue, to some sort of "finding" relevant to the "business of insurance" issue. *Compare* Opposition at 11 with the Sixth Circuit's Opinion (Petition at 23a).

of insurance" test. Rather, it fashioned an impermissibly broad reading of Justice Blackmun's majority opinion in *U.S. Dept. of the Treasury v. Fabe*, 508 U.S. 491 (1993) (Justices Kennedy, Scalia, Souter and Thomas dissenting) that undermines and defeats the interests of RICO plaintiffs across the country seeking to combat insurance company fraud. As Justice Kennedy pointed out in his dissent, the majority opinion in *Fabe* cannot be read to provide that "any law which redounds to the benefit of policyholders is, *ipso facto*, a law enacted to regulate the business of insurance." *Id.* at 511.

The Sixth Circuit's decision conflicts with this Court's pronouncement in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 38-39 (1996) (the MFA "does not seek to insulate state insurance regulation from the reach of all Federal law.").

2. "IMPAIRMENT" QUESTION

Respondents claim that the "impairment" test set forth in *Humana, Inc. v. Forsyth*, 525 U.S. 2999 (1999), is uniformly followed by every U.S. Court of Appeals in the country. They dispute Petitioners' representation that a conflict exists between the Third, Fourth and Tenth Circuits, on the one hand, and the Sixth and Eighth Circuits, on the other hand, with respect to the application of the *Humana* test. Respondents insist that any inter-circuit disparity results from the application of differing state law and conclude that, again, "impairment" here presents a mere "misapplication" question, inappropriate for review under Supreme Court Rule 10.

Respondents attempt the same sleight of hand with respect to the "impairment" issue as they did with respect to the "business of insurance" issue, discussed above. Specifically, they argue that, inasmuch as the Sixth Circuit pays nominal deference to *Humana* as controlling, no reviewable question can be raised regarding the manner of its application. The sleight of hand works no better here.

Humana resolved one inter-circuit disparity but spawned another. The Third,[4] Fourth[5] and Tenth[6] Circuits read the MFA to allow RICO to supplement state anti-insurance fraud efforts while the Sixth[7] and Eighth[8] Circuits do not. Further, the decision of the Sixth Circuit in the case at bar is in conflict with *Humana* itself. Such conflict is best revealed by focusing on Ohio's so called "Prompt Pay Act," Ohio Rev. Stat. §3901.38112, and the position of the Office of the Ohio Attorney General with respect thereto, as embraced by the Sixth Circuit.

4 *Weiss v. First Unum Life Ins. Co.*, 482 F3d 254 (3rd Cir. 2007).

5 *American Chiro. v. Trigon Healthcare*, 367 F3d 212 (4th Cir. 2004).

6 *Bankoklahoma Mortgage Corp. v. Capital Title Co.*, 194 F3d 1089 (10th Cir. 1999).

7 *Riverview Health Institute, LLC, et al. v. Medical Mutual of Ohio*, et al., 601 F3d 505 (6th Cir. 2010).

8 *LaBarre v. Credit Acceptance Corp.*, 175 F3d 610 (8th Cir. 1999).

The Prompt Pay Act provides that "[t]he remedies imposed by the superintendent [of insurance] under this section are *in addition to, and not in lieu of*, such remedies as providers and beneficiaries may otherwise have by law." Ohio Rev. Stat. §3901.38112 (e) (emphasis added). Contrary to the express language of the Act, the Office of the Attorney General of Ohio argued before the Sixth Circuit that victims of insurance fraud (including RICO victims) are limited to administrative remedies before the Ohio Superintendent of Insurance, as provided by the Act, and that enforcement of RICO would "impair" enforcement of the Act by officials of the Office of the Attorney General, in cooperation with insurance company personnel, on behalf of the Ohio Superintendent of Insurance.[9]

Counsel for Petitioners directed the attention of the Sixth Circuit to the above-cited provision of the Prompt Pay Act.[10] Nonetheless, the Sixth Circuit embraced the enforcement paradigm outlined by the Office of the Attorney General, never dealing with the clear statutory admonition that state remedies are intended to supplement, rather than supplant, other remedies provided by law. Respondents also fail to address the point in their Opposition.

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9 *See* Brief of Amicus Curiae State of Ohio [filed with the Sixth Circuit] In Support of Appellees Medical Mutual of Ohio; Kent W. Clapp; David G. Quiring; Kathy Schneeberger, March 23, 2009.

10 *See* Petition, Appendix C (Excerpt from Oral Argument before the Sixth Circuit) at 59a. The Prompt Pay Act provision was also treated at length in briefs filed with the Sixth Circuit by Petitioners.

The factors delineated in *Humana* are designed to ensure that plaintiffs have recourse to RICO in situations where its application will not have an adverse impact on the proper functioning of state insurance law. The Third, Fourth and Tenth Circuits have complied with the holding in *Humana* and have resisted entreaties to deny the availability of RICO for patently invalid reasons. The Sixth Circuit's decision in the case at bar, on the other hand, conflicts with both the law-abiding decisions of the Third, Fourth and Tenth Circuits and the holding in *Humana*.

3. THE PETITION SHOULD BE GRANTED

This Court recognizes its duty to ensure that decisions of the circuit courts are in legal conformity with its prior decisions and with the decisions of the courts of appeals in other circuits. See, e.g., *First Nat'l Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, *rehearing denied*, 393 U.S. 901 (1968) and *Heflin v. U.S.*, 358 U.S. 415 (1959) (both noting a conflict between an opinion of a circuit court and the Supreme Court); *see also Mitchell v. Budd*, 350 U.S. 473 (1956) (noting a conflict between the decision of the circuit court below and those of the Supreme Court and of courts of appeals in other circuits).

The national importance of the problems and questions presented in this case and the conflicts presented between the decision of the Sixth Circuit and those of the Supreme Court and of courts of appeals in other circuits justify a grant of the Petition for Writ of Certiorari.

CONCLUSION

For the reasons set forth in their Petition for Writ of Certiorari and herein above, Petitioners respectfully renew their request that, in accordance with Supreme Court Rule 16.1, the Court enter an order providing summary disposition of the case, reversing the judgment of the Sixth Circuit, remanding the case to the District Court, and directing that Petitioners be permitted to proceed on their RICO claims. Alternatively, in accordance with Supreme Court Rule 16.2, Petitioners respectfully request that the Court undertake review of the judgment of the Sixth Circuit.

Respectfully submitted,

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